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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants*,

v.

LEE OPTICAL OF OKLAHOMA, INC., ET AL.

On Appeal From the District Court of the United States for the Western District of Oklahoma

BRIEF AMICI CURIAE

FOR THE GUILD OF PRESCRIPTION OPTICIANS OF AMERICA, INC.; AMERICAN COMMITTEE ON OPTICS AND VISUAL PHYSIOLOGY; OKLAHOMA CITY ACADEMY OF EYE, EAR, NOSE & THROAT; CALIFORNIA MEDICAL ASSOCIATION; LOS ANGELES SOCIETY OF OPHTHALMOLOGY & OTOLARYNGOLOGY; MEDICAL SOCIETY OF THE STATE OF PENNSYLVANIA, CONSERVATION OF VISION COMMITTEE; NEW JERSEY OPHTHALMOLOGICAL SOCIETY; NORTH CAROLINA EYE, EAR, NOSE & THROAT SOCIETY; PACIFIC COAST OTO-OPHTHALMOLOGICAL SOCIETY; PENNSYLVANIA STATE OPHTHALMOLOGICAL & OTOLARYNGOLOGICAL SOCIETY; PHILADELPHIA COUNTY MEDICAL SOCIETY, CONSERVATION OF VISION COMMITTEE; READING OPHTHALMOLOGICAL SOCIETY; SAN BERNARDINO MEDICAL SOCIETY; SECTION ON OPHTHALMOLOGY, MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA; SOUTH CAROLINA ASSOCIATION OF OPHTHALMOLOGY

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INDEX

Page

The Amici Curiae and Their Interest 1

Statement of Facts 4

Summary of Argument 9

Argument 11

The Legislative Scheme Adopted by Oklahoma, Being Arbitrary, and Unrelated and Unnecessary to the Achievement of the Legitimate End Sought, and Being Predicated Upon an Unconstitutional Delegation of State Power, Imposes Oppressive Conditions on the Rights of Ophthalmologists and Opticians to Pursue Their Lawful Callings, Thereby Denying Property Rights Without Due Process of Law 14

A. The Stated Aim of the Statute 15

B. The Legislative Scheme 15

1. The Prescription 16

2. Responsibility 21

C. Constitutional Infirmities 24

1. A Statute Aimed at Preventing Unqualified Persons from Dispensing Prescription Eyeglasses Which, Instead of Imposing Standards of Personal Qualification, Establishes Oppressive Conditions—Unrelated to the Public Welfare—on the Rights of Ophthalmologists and Opticians to Practice, Denies Due Process 24

2. A Statute Which, Totally Without Standards, Delegates Complete Control of One Occupational Group to Private Persons, Including Many Competitors, Denies Due Process 30

Conclusion 32

TABLE OF CASES

Page

Arkansas State Board of Optometry v. Keller, 218 Ark. 820, 239 S.W. 2d 14 24
Barsky v. Board of Regents of University, 347 U.S. 442 ..... 26, 28, 31
Bolling v. Sharpe, 347 U.S. 497 12
Carter v. Carter Coal Co., 298 U.S. 238 32
Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 ..... 11, 12
Daniel v. Family Security Life Insurance Co., 336 U.S. 220 ..... 11, 12, 25
Day-Brite Lighting v. State of Missouri, 343 U.S. 421 ..... 11, 12
Douglas v. Noble, 261 U.S. 165 ..... 24, 25, 27, 31
Eubank v. Richmond, 226 U.S. 137 32
Kresge Co. v. Ottinger, 29 F. 2d 762 (S.D.N.Y.) affirmed *sub nom.* Roschen v. Ward, 279 U.S. 337 17
Lawton v. Steele, 152 U.S. 133 14
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 ..... 11, 12
Nashville, Chattanooga & St. Louis Railway v. Walters, 294 U.S. 405 16
New State Ice Co. v. Liebmann, 285 U.S. 262 ..... 28, 29
Palmer v. Smith, 229 N.C. 612, 51 S.E. 2d 8 24
Pierce v. Society of Sisters of Holy Names, 268 U.S. 510 28
Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62 14
Roschen v. Ward, 279 U.S. 337 ..... 13, 17, 30
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 ..... 26, 31
Smith v. Texas, 233 U.S. 630 29
State v. McGrail, 117 W. Va. 51, 183 S.E. 686 23
State v. Rones, 223 La. 839, 67 So. 2d 98 24
State ex rel Booth v. Beck Jewelry Ent., Inc., 220 Ind. 276, 41 N.E. 2d 622 24
Washington ex rel Seattle Title Trust Co. v. Roberge, 278 U.S. 116 32
Wieman v. Updegraff, 344 U.S. 183 15

STATE STATUTES

Page

Arkansas Stat. Ann. § 72-801 (1947) 24
Colorado Rev. Stat. § 102-1-1 (1953) 24
Idaho Code Ann. § 54-1515 (1948) 23
Indiana Stat. Ann. § 63-1004 (Burns 1951) 24
Iowa Code Ann. § 154.9 (1949) 24, 28
Louisiana Rev. Stat. § 1041(3) (1950) 24
Maine Rev. Stat., c. 69, §§ 6(III), (IV) (1954) 23, 24
Montana Rev. Code §§ 66-1302(9), 1316 (1947) 23, 24
New Mexico Stat. Ann. § 51-714 (1941) 23
Ohio Rev. Code § 4725.14 (Page's 1954) 23
Oklahoma Stat. Ann., T. 59, §§ 492, 581, 588 (1951)...8, 16
Oregon Rev. Stat. § 683.010 (1953) 24
South Dakota Code of 1939 § 27.0701 (Supp. 1952).... 24
Tennessee Code of 1938 § 7028 (Michie's) 23
Utah Code Ann. § 58-16-13 (1953) 23
Washington Rev. Code § 1853.040 (1951) 23
West Virginia Code of 1949 § 2931(d) 23
Wyoming Comp. Stat. § 37-1802 (1945) 23

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THE AMICI CURIAE AND THEIR INTEREST

The Guild of Prescription Opticians of America, Inc., submits this brief amicus curiae with the consent of the parties.

The consent of the attorney for the appellants having been refused, leave to join as amici curiae in the filing of

this brief is being requested by separate motion, filed herewith, on behalf of the following medical and ophthalmological societies:

American Committee on Optics and Visual Physiology
Oklahoma City Academy of Eye, Ear, Nose & Throat
California Medical Association
Los Angeles Society of Ophthalmology & Otolaryngology
Medical Society of the State of Pennsylvania, Conservation of Vision Committee
New Jersey Ophthalmological Society
North Carolina Eye, Ear, Nose & Throat Society
Pacific Coast Oto-Ophthalmological Society
Pennsylvania State Ophthalmological & Otolaryngological Society
Philadelphia County Medical Society, Conservation of Vision Committee
Reading Ophthalmological Society
San Bernardino Medical Society
Section on Ophthalmology, Medical Society of the District of Columbia
South Carolina Association of Ophthalmology

The Guild of Prescription Opticians of America, Inc., a non-profit membership corporation formed under the laws of Pennsylvania, is a national organization representing skilled and ethical dispensing opticians located throughout the United States, including the State of Oklahoma, and Canada. Its purpose and function is to serve the public interest in visual care by the advancement of the science of optics and opticianry, by disseminating information concerning these advances and by the promotion and maintenance of high standards of skill and ethics in the practice of opticianry.

The Guild wholeheartedly endorses state regulation in the field of visual care. It has for many years actively cooperated with the medical profession and state officials

to that end. It believes, however, that Section 2 of Enrolled House Bill 953, enacted by the Legislature of Oklahoma in 1953, establishes a regulatory system unique among the 48 states which bears no relation to the improvement of visual care; to the contrary, by arbitrarily burdening the practice of ophthalmology and opticianry, it is detrimental to the public welfare. It represents retrogression and not progress.

The American Committee on Optics and Visual Physiology is composed of representatives from the Section on Opthalmology, American Medical Association, the American Ophthalmological Society, the American Academy of Ophthalmology and Otolaryngology, and the Association for Research in Ophthalmology. It represents virtually all qualified licensed ophthalmologists throughout the United States. Its purpose and function is to promote the public interest in visual care by coordinating and disseminating information on matters of significance in the science and profession of ophthalmology, and by maintaining the highest professional ethical standards.

The medical and ophthalmological societies listed above represent qualified licensed physicians and ophthalmologists in their respective geographical areas. The Oklahoma City Academy of Eye, Ear, Nos & Throat states:

> The Oklahoma City Academy of E.E.N.T. is the only Ophthalmological Society in the State and is made up of members both in and out of Oklahoma City. It is our belief that it represents the opinion of the State ophthalmologists.

The American Committee on Optics and Visual Physiology and the medical and ophthalmological societies which have joined with it firmly support state regulation of the field of visual care. They endorse in general the aim of the Legislature of the State of Oklahoma. They object, however, to the manner in which Section 2, under the guise of promoting the public health and welfare but in fact to the detriment of the medical profession, has

advanced not the public's interest in eyesight, but the economic interest of the optometrist.

These Amici take sharp issue with the Attorney General of Oklahoma when he implies that Section 2 has no significant effect upon ethical practitioners (Br. p. 32-33), and therefore urge affirmance of the judgment below in order that this Section will be stricken from the statutes of Oklahoma and may not become a pattern for legislation in other states.

STATEMENT OF FACTS

The three judge district court below held unconstitutional portions of Sections 2, 3 and 4 of Enrolled House Bill 953 (R. 27-28). These Amici file this brief with respect to Section 2 which was unanimously found to violate rights protected by the Fourteenth Amendment. Circuit Judge Murrah, while dissenting as to Sections 3 and 4, expressed the firm opinion that the unconstitutionality of Section 2 was "clear" (R. 63-64, 68).

The judgment below does not affect the continuing prohibition against any person other than a licensed ophthalmologist or optometrist examining or refracting eyes or prescribing corrective lenses. Rather it is effective solely to eliminate the new prohibitions that an optician may not, without prescription, transfer lenses from one frame to another, duplicate—by means of a lensometer—lenses previously prescribed by licensed examiners, or make any repairs to eyeglasses which require fitting or adapting the frames to the face of the wearer. This holding reflects the following facts of record concerning the three main groups in the field of visual care—the ophthalmologist, the optician and the optometrist—and their interrelationships (R. 37, 41-42).[1]

Ophthalmology is the medical science and profession devoted to the examination, diagnosis and treatment of

[1] The opinion of the court below (R. 36-62) constitutes its findings of fact and conclusions of law (R. 27).

all diseases of the eye, including the refraction or measurement of a patient's visual power and the issuance of prescriptions for corrective lenses. The ophthalmologist is a doctor of medicine qualified by specialized training and experience, and by statute, to treat by means of medicine, surgery and refractive procedures any and all disorders and malfunctions of the human eye. The ophthalmologist, sometimes known as an oculist, is the eye physician. He is the ultimate specialist—the only man whose judgment can be accepted as definitive in many ocular conditions (R. 37, 41-42; 90-92, 293, 333).

If examination reveals the existence of refractive error in the eyes of the patient, the ophthalmologist prepares a prescription (R. 91). Most prescriptions contain only data relating to the strength of the correcting lenses (R. 367). "The evidence indicates, almost without variance, that written prescriptions . . . contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer" (R. 45). Prescriptions for fitting, adjusting and adapting frames are impossible or impractical to write (R. 101). Such fitting and adjusting can be accomplished only after the patient has selected the frames he desires and his individual requirements have been determined. (R. 367-371, 373).

Since ophthalmologists commonly do not fill their own prescriptions (R. 96, 334, 342-343),[2] they give the prescription to the patient to be filled by any optician he chooses (R. 91). It is considered improper for an ophthalmologist to specify a particular optician (R. 305). However, he may recommend several competent opticians (R. 91, 229, 304-305). A minority of ophthalmologists request the patient to return for a check of the accuracy with which the original prescription has been filled (R. 48-49). In such in-

[2] An ophthalmologist practicing in the smaller towns where no optician is available must of necessity perform the optician's functions (R. 96-97). There may also be exceptions for other reasons (R. 163-164).

stances, a clerk in his office performs this function with a lensometer (R. 49).

The optician is the "right arm" of the ophthalmologist and bears the same relationship to him as the pharmacist to the general medical practitioner (R. 97). He interprets the ophthalmologist's prescription, measures the patient's relevant features, administrates the grinding of the lenses and their insertion in frames of the patient's choosing and adapts or fits the frames to the face of the patient. A correlative function of the optician lies in replacement: if lenses, otherwise satisfactory, are broken but a sufficient fragment remains, the optician duplicates them by means of the lensometer—invented by opticians (R. 343)—the same precision instrument he uses in verifying the lenses originally prescribed; if a person wearing glasses is comfortable with his lenses but desires duplicate or different frames, the optician duplicates or transfers the lenses and fits such frames. Finally, he also repairs and adjusts eyeglasses to the face (R. 37, 97-99, 117, 268-269, 276-277, 313-314, 368-376). In the performance of these functions, the optician must possess artisan skill related to the science of optics and knowledge of optical terms (R. 37, 45, 47). The court below found, as the evidence established, that the ophthalmologist and optometrist "possess no knowledge or skill superior to a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated" (R. 51, 98-99, 164).[3]

The optician, however, is more than an artisan. He is also engaged in the sale of lenses and frames (R. 37, 42, 45). He, like most optometrists, maintains a complete stock of frames from which the customers may make selections; these frames vary in size, shape, color and

[3] This finding was abundantly supported by the uncontradicted testimony of the foremost ophthalmologists in the country (R. 90, 266-267, 275, 309-310, 337-338, 366-367, 402-406).

adornment (R. 37). The profit from the sale of lenses is relatively small compared to the profit from the sale of frames (R. 197). Between 60 and 75 percent of an optician's gross income is derived from the sale of frames (R. 196-198, 206). Charges are not made for adjustments and minor repairs (R. 134).

The optometrist renders an integrated eye service. He refracts eyes by non-medical means (R. 37). He may not employ drops as an aid in refraction. He is not a physician or medical doctor and is prohibited from diagnosing and treating diseases of the eye. The optometrist renders optical dispensing services to his patients and sells frames, lenses and eyeglasses, both original and replacement (R. 37, 42). Optometrists do not issue prescriptions to their patients except in rare instances (R. 117, 133, 158, 253, 381). The rarity of this is illustrated by the testimony of an optician that in three and one-half years he has filled "not more than three" optometrists' prescriptions (R. 133); and by the testimony of an optometrist that "the only time" he will issue a prescription to a patient is when he is "leaving town" (R. 253). As stated by the amicus American Optometric Association, Inc., "optometrists do not refer their patients to opticians" (Br. p. 27; R. 11).

Since the optometrist fills all of his own prescriptions (R. 45), his patient does not patronize opticians: a person whose eyes are refracted by an optometrist must purchase the original eyeglasses from him and have them fitted by him (R. 133-134, 158, 252, 381). The major portion of the optometrist's income is derived from the sale of the lenses and frames (R. 133-134, 160).

In the field of original eyeglasses, the optician must look to the patients of ophthalmologists for his customers. These represent as much as 40% of the eyeglass wearing public. The optometrists examine and dispense for the remaining 60% (R. 45). As a necessary consequence, anything which causes an ophthalmologist to reduce the number of refractions he performs or the number of prescriptions he issues automatically reduces the optician's busi-

ness (R. 381). In the field of replacement eyeglasses, the patients of both ophthalmologists and optometrists have been able to patronize the optician without prescriptions. Sales to these persons without prescription account for a substantial percentage of opticians' income—variously estimated from 25% to 50% (R. 166, 196-198, 206). Income from this source is so significant that an ethical optician of vast experience testified that if it were lost (R. 166):

> I think it would break most dispensing opticians . . . My own business and that of every dispensing optician would drop at least forty to fifty percent.

Against this factual background, the State of Oklahoma enacted Enrolled House Bill 953. Previously, the State had by appropriate legislation restricted the refraction of eyes to licensed ophthalmologists and optometrists. No others could prescribe corrective lenses for refractive error. 59 Okla. Stat. Ann. §§ 492, 581 (1951). The State had never passed legislation designed to regulate the practice of opticianry by prescribing standards, licensing or otherwise (Br. for Appellants, p. 13). Instead, the Legislature enacted Section 2 which makes it unlawful for any person, other than a licensed physician or optometrist (full text in Appendix),

> "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or
>
> to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses . . .
>
> to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section,"

except as "any optical supplier" may be authorized by written prescription, or its duplicate, from an Oklahoma licensed physician or optometrist,

> "provided, however, that the physician or optometrist writing such prescription shall remain responsible for

> the full effect of the appliances so furnished by such other person."

and

> "Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

SUMMARY OF ARGUMENT

The Oklahoma statute seeks to promote visual care by preventing unqualified persons from correcting the eyes of others. Section 2, unlike the law of any other jurisdiction, undertakes to achieve this aim not by licensing the only unlicensed group involved but by conditioning the dispensing and sale of optical goods on two interrelated provisions: (1) It requires a prescription from a licensed ophthalmologist or optometrist before any function relating to eyeglasses may be performed by an optician, and (2) it places responsibility upon the prescribing practitioner for the full effect of the eyeglasses furnished by the optician.

The prescription, of course, has long been required in Oklahoma as elsewhere to provide the formuli of new lenses. Therefore, such requirement is significant to this case only in the market for replacement needs: the prescription is made a prerequisite to such subsidiary needs of the wearers of eyeglasses as buying new frames for use with old or duplicate lenses, replacing broken lenses, and anything else requiring adjustment or fitting of frames to the face. But the prescription rarely can or does contain data regarding the fitting and adapting of lenses and frames; lenses may be accurately duplicated without prescription by use of the precision lensometer; and any prescription may continue to be dispensed by anyone in the State "whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character."

The responsibility provision is significant only to the ophthalmologist. Optometrists always fill their own pre-

scriptions and neither release nor are by statute required to release them to their patients to enable them to go elsewhere for original or replacement needs. On the other hand, the ophthalmologist being a professional specialist does not engage in dispensing. He is therefore dependent upon the optician—the specialist dispenser. Under the statute as interpreted by the Attorney General, however, the ophthalmologist cannot supervise his responsibility for the optician's performance. He cannot select the optician to whom the patient must take his prescription; his prescription may be transferred freely from one optician to another; and he cannot compel the patient to return for checking. All that the statute does is shift to the ophthalmologist responsibility for the full effect of the work of any optician, known or unknown, qualified or unqualified, to whom the prescription may be taken or transferred.

Not only, then, does Section 2 employ means unrelated to the statute's aim of preventing unqualified persons from participating in visual care, but it imposes conditions and limitations on the practices of ophthalmology and opticianry which—as forbidden by this Court—are unrelated to personal qualifications. The ophthalmologist's practice is conditioned upon assumption of an onerous and uncontrollable responsibility. The optician's practice is conditioned upon a prescription-license (1) which an optometrist will not issue and which the statute does not require him to issue, (2) which an ophthalmologist is oppressively discouraged from issuing and (3) which, even if issued, the optician cannot hold himself out as qualified to receive. The only result of these conditions and limitations is that the optometrist, by not issuing prescriptions, now gains by statutory leverage a stranglehold on the replacement needs of persons whose eyes he refracts. In addition, the onerous conditions on the practice of the ophthalmologist and the optician have the practical effect of continuously channeling to the optometrist the patients of those specialists. The inevitable thrust of the statute is optometric monopoly of both refracting and dispensing.

If Section 2 could be construed to permit the licensed practitioner to discharge his responsibility of supervision, so that he could freely issue prescription-licenses and fully control the opticians who dispense them, complete control of opticians would thus be delegated to private persons, including many competitors, without statutory standards, and without appeal or review. Such power not only to establish private and subjective standards for opticians but also to determine which opticians meeting those standards may remain in business would amount to an unconstitutional delegation of power long forbidden by this Court.

ARGUMENT

In urging affirmance of a judgment declaring a state statute unconstitutional, these Amici are well aware—as was the court below (R. 39-40, 63-64)—that this Court has adopted and adhered in recent years to an extremely broad view of the constitutional area within which state legislatures may act. This Court will not, under the due process clause of the Fourteenth Amendment, "sit as a super-legislature to weigh the wisdom of legislation," *Day-Brite Lighting* v. *State of Missouri*, 343 U.S. 421, 423, nor does it deem itself "equipped to decide desirability." *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 224. "Within the area of constitutionality, the states should not be restrained from devising experiments," *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 551, and "the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-537.

But the judicial abstention and deference to state legislatures which these pronouncements reflect are not, as appellants and their amici contend, to be equated with judicial abdication. "[O]bjections which go to constitu-

tionality" are still the concern of this Court. *Cohen* v. *Beneficial Industrial Loan Corporation, supra,* at 550. States may exercise their control within wide latitude only "so long as specific constitutional prohibitions are not violated." *Day-Brite Lighting* v. *State of Missouri, supra,* at 423; *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co., supra.* The manner in which a legislature exercises its power must be "reasonably related" to a proper governmental objective. *Bolling* v. *Sharpe,* 347 U.S. 497, 500. A statute which "has no relation to the elimination of those evils" a state may wish to combat "cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them,' " even though "unreasonable" and "arbitrary" are now to be more strictly construed than when that rule was first formulated. *Daniel* v. *Family Security Life Insurance Co., supra,* at 224-225.

In the light of these principles governing review, and in order to set the case in proper perspective, these Amici not only readily concede, but endorse, the following propositions:[4]

1. The field of visual care is a proper area within which a state may legislate.
2. Practitioners in the field—ophthalmologists, opticians and optometrists—may all properly be regulated, compelled to adhere to standards, and licensed.
3. Eye examinations should be restricted to duly licensed ophthalmologists and optometrists.
4. Prescriptions from licensed ophthalmologists and optometrists should be required before opticians may

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[4] This position is identical with that of the Attorney General of California as set forth in his *amicus* brief. These Amici do not, however, share his belief that the decision below may in any way be construed as holding that the activity of adapting lenses and frames to the face cannot be regulated in the public interest. See R. 49.

dispense new—as distinguished from duplicate—lenses.

5. Responsibility may properly be imposed on each of the above groups for the carrying out of its individual functions.

The contention of these Amici, however, is that Oklahoma, in venturing into a field properly subservient to the exercise of its police power and with a proper and desirable purpose, has run afoul of the due process requirements of the Fourteenth Amendment, not "because it might have gone farther than it did, or because it may not succeed in bringing about the result" that it purports to produce, *Roschen* v. *Ward*, 279 U. S. 337, 339, but because the means adopted (1) are wholly unrelated to the end sought, (2) involve an unconstitutional delegation of power, devoid of standards, not to members of an administrative board or tribunal but to private persons including competitors, and (3) will tend and succeed, all to the economic advantage of optometrists, only in oppressively discriminating against ophthalmologists and opticians, thereby obstructing and diminishing the public health, safety and welfare. And the arbitrariness of the means employed by Oklahoma are especially emphasized by the acknowledged existence of alternative means, of demonstrated merit and effectiveness in all walks and areas of business, industrial and professional life—including the field of visual care[5]—which are undeniably capable of achieving all that the Oklahoma legislature desires without infringing upon centuries-old rights and liberties of the profession of medicine and the art of opticianry.

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[5] See, for example, the *amicus* brief of the Attorney General of California setting forth that state's system for licensing dispensing opticians. At least eleven other states similarly regulate opticians by licensing: Alabama, Connecticut, Florida, Kentucky, Nevada, New Jersey, New York, North Carolina, South Carolina, Virginia and Wisconsin. As demonstrated by the dates of enactment—five being within the past four years—the modern trend is in this direction.

THE LEGISLATIVE SCHEME ADOPTED BY OKLAHOMA, BEING ARBITRARY, AND UNRELATED AND UNNECESSARY TO THE ACHIEVEMENT OF THE LEGITIMATE END SOUGHT, AND BEING PREDICATED UPON AN UNCONSTITUTIONAL DELEGATION OF STATE POWER, IMPOSES OPPRESSIVE CONDITIONS ON THE RIGHTS OF OPHTHALMOLOGISTS AND OPTICIANS TO PURSUE THEIR LAWFUL CALLINGS, THEREBY DENYING PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW.

Acknowledging and endorsing the vital interest of the public and the power of the state in regulation of the field of human eyesight and visual care, these Amici's intimate relationship to and knowledge of that field has led them to challenge the manner of "regulation" adopted by the State of Oklahoma. Measuring the means adopted by the legislature against the end it seeks to achieve is a yardstick of constitutionality which this Court has consistently applied:

> . . . To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; *and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. . . . *Lawton* v. *Steele*, 152 U. S. 133, 136-137 (emphasis added).

While the application of this rule in recent years has been conditioned by greater tolerance for the legislative judgment, nevertheless "the Amendment has been effective to create substantial limitations upon the methods by which the changes deemed necessary may be made." Mr. Justice Rutledge dissenting in *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U. S. 62, 90, in voting to sustain the constitutionality of state action. Upon this principle, this Court only recently held unanimously that regardless of whether or not a constitutionally protected right to public

employment existed, "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U. S. 183, 192. An analysis of Section 2 of the Oklahoma statute demonstrates that the means employed, instead of tending to achieve the avowed end sought by the legislature, can only succeed in arbitrarily benefitting the integrated practitioner at the expense of the specialist groups in the field of visual care.

A. The Stated Aim of the Statute.

The acknowledged and legitimate purpose of Section 2 of the Oklahoma Act is to advance the public interest in visual care by insuring quality, regulation and maintenance of standards in the dispensing and sale of optical goods. The policy of the law is thus stated in its opening section:

> SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

As expressed by the Attorney General of Oklahoma in his brief, the object is to "govern all persons, trades or professions that may be involved in the sale of corrective optical goods or eyeglasses to the people of Oklahoma" (Br. p. 39; R. 76). According to the amicus American Optometric Association, Inc., the purpose is to "make sure that the optician's services are dispensed in the public interest" (Br. p. 27).

B. The Legislative Scheme.

The vice of the Oklahoma legislation here in issue is hidden by the initial plausibility of its method: a statute

loftily aimed at the promotion of visual care undertakes so to do by the apparently innocent and reasonable avenues of (1) requiring prescriptions from licensed eye practitioners before any function relating to eyeglasses may be performed, and (2) placing responsibility on licensed eye practitioners for the full effect of the eyeglasses furnished pursuant to their prescriptions—a device respectably characterized by the Attorney General as "professional responsibility" (Br. p. 5). When read or said quickly, these provisions sound fine. Upon reflection and a look at undisputed facts, however, the sound changes. An examination into the facts of the field being regulated is essential when the constitutionality of legislation is at issue. "A statute valid as to one set of facts may be invalid as to another." *Nashville, Chattanooga & St. Louis Railway* v. *Walters*, 294 U. S. 405, 415.

1. The Prescription.

In the original equipment market, i.e. new lenses, it is of course the unvarying practice and law that persons who do not already wear eyeglasses, or who wish to have inadequate lenses changed, do not and cannot become customers of opticians without first, as patients, having their eyes examined by a licensed practitioner and receiving a prescription for new lenses. The reason is simple: ophthalmic lenses must be prescribed according to the individual quality and needs of the patient's eye—characteristics ascertainable only by refraction. For an unlicensed person to dispense new lenses without such refraction and prescription has long been prohibited in Oklahoma, and throughout the United States, as the unlawful practice of optometry. 59 Okla. Stat. Ann. §§ 581, 588.[6] Prescrip-

[6] Because the requirement of prescriptions for new lenses has never been questioned anywhere and has nothing to do with this case, the complaint of amicus American Optometric Association, Inc., that the court below "completely disregarded the much more important application of [Section 2 which] prevents the illegal practice of optometry" (Br. p. 16, n. 8) is without merit.

tions, or lenses already prepared in accordance therewith, have thus always been a *sine qua non* to an optician's entry into the eye picture. In addition, some states have extended this principle to require professional examination or supervision before any lenses, ready-to-wear as well as ophthalmic, may be sold. *Roschen* v. *Ward*, 279 U. S. 337, so heavily relied upon by the appellants, did no more than sustain the constitutionality of such a statute.[7]

The entire assault on Section 2 is, in this Court as in the court below, directed solely at the requirement of physical possession of a prescription in the replacement or after market:[8] where customers whose eye examination needs and visual problems have already been satisfied but whose merchandising needs, or physical accommodations of frames to the face, are paramount. It is in this area that the statute, uniquely, has demanded a prescription for an optician, but not the competing optometrist, to fill such familiar subsidiary needs of eyeglass wearers as:

1. Replacing of broken lenses;

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[7] The New York statute upheld in *Roschen* v. *Ward* provided that:

> Nothing in this article shall be construed to apply to . . . persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists or who duplicate broken lenses. 29 F. 2d 762.

[8] The law would thus be violated if the prescription was telephoned. This was clearly demonstrated in the following colloquy between court and counsel below:

> Judge Vaught: I don't care to inject any new evidence, but two years ago, for instance, I was holding court in Enid. I dropped my glasses, broke a lens. I couldn't see. You know, if a judge can't see, he is as bad off as a lawyer that can't see. I went into an optician there, office there at Enid. I told him who had made my glasses, who the doctor was and who the optician was. He says, "You just leave them here." He called the optician and got the prescription. Now would you say that that was a violation of the Act?
>
> Mr. Hansen: I think that he would have to have the prescription or a duplicate of the prescription on file with him before he could do it, yes, sir . . . (R. 185).

2. Placing of old lenses in new frames where old frames have broken or become outmoded;

3. Purchasing a second, duplicate pair of eyeglasses to match those already being used;

4. Having uncomfortable frames refitted, by bending and adjustment, "to the face";

5. Any other repair requiring the fitting of eyeglasses "to the face" (R. 189).

As any wearer of eyeglasses readily knows, practically no function—with the possible exception of replacing a hinge screw—can competently and completely be performed by an optician without thereafter placing the frame on the face and adapting it to a comfortable fit. Yet all these functions are henceforth prohibited to the optician, and channeled to the optometrist, unless the customer has a prescription. This means that optometric patients, who cannot obtain release of their prescriptions, and those ophthalmological patients who, when the need arises, do not have their prescriptions with them, are no longer free to patronize the optician. The extent of the statute was strikingly illustrated by the following colloquy between court and counsel:

> Judge Murrah: Well, suppose I break this, what do I want to say—
> Mr. Woods: Temple piece.
> Judge Murrah: Temple piece. Suppose I break the temple piece and I take it, could he replace the temple piece and adjust it so that it would fit comfortably?
> Mr. Hansen: I have doubt upon that; I have doubt upon that (R. 191-192).

A prescription, almost uniformly, contains solely the eye examiner's formuli indicating the power and axis of lenses required. The court below found that virtually no prescription contains directive data respecting the fitting of frames to the face. Moreover, the evidence conclusively

established that prescriptions are not capable of communicating how such functions should be performed. This is a matter of artisan skill to be adapted, by touch and by sight, to each individual problem. Cognizant of the contents of the usual prescription, counsel for the State conceded below that the statute imposed no requirement which would, or could, require more detailed specification as to the adapting and fitting of lenses and frames to the patient's face (R. 183-187).[9] Despite this concession, the Attorney General advances in this Court a list of reasons which, under his theory of the case, justify the constitutional validity of the prescription as a prerequisite to performance by the optician—but not the optometrist—of every function in the replacement field (Br. pp. 34-36). These reasons, however, are confined to but a small portion of the optician's replacement functions and, if consequential, would apply equally to the optometrist who may perform the identical functions without the prescription. For example, in the post-operative lens distance items, the optometrist without the prescription is in no better position to know what the eye-surgeon prescribed than is the dispensing optician. But the real answer to these strained and overlapping points is that they are gleaned from isolated bits of testimony concerning rare and unusual situations and are directly in conflict with the findings of fact of the court below (R. 45, 47). Significant in this connection is

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[9] "Judge Murrah: Can he do anything except that which is set forth?

Mr. Hansen: He must follow the prescription. He must not depart from the prescription, but things not covered by the prescription, why of course he can go ahead and do. That's why the Legislature made them responsible for the acts of the persons when they turned that over, if they didn't give sufficient definite instruction for him to do it and something wrong happened, if there is a liability which would arise under the statute, he would be responsible. He could have gone further; he didn't go further, but he must write the prescription, it must have the measurement. The other things, we don't think it would be necessary. We think that is up to the physician or the optometrist. We do not think he needs to go further (R. 184)."

the statement of the Attorney General of California in his amicus brief:

> Under California law the registered dispensing optician may use his skill and judgment in adapting the lenses to the eye. The law does not require and the prescription rarely provides any specifications regarding the adaptation of the lenses and frames to the eye.
>
> * * * * *
>
> The duplication of the lens is a mechanical shop operation. The adaptation of the lenses and frame to the eye is an activity in the pursuit of a calling involving personal contact with the patient. Proper performance of the function requires skill and judgment and additionally so because the prescription does not specify any particulars regarding the adaptation (Br. pp. 5, 11-12).

Having established the prescription as prerequisite to patronizing an "optical supplier"[10] in the replacement or after market, the legislature chose not to define that term. More important it made no effort to erect or define standards or qualifications for optical suppliers. In fact Oklahoma frankly announces to this Court

> That the Legislature of Oklahoma has never enacted a statute which requires an *optician of this State*, before he is entitled to practice his trade or occupation therein, to possess prescribed educational qualifications or be of good moral character, or to pass a required examination and procure a license as a qualified optician, *hence any person in this State, whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character, may operate as an optician in this State*. . . . (Br. p. 13) (second emphasis added).

The State's position as to who may be qualified under the new Act was clearly spelled out in reply to a question from the court below in regard to the repair provision:

[10] The State conceded that this term includes dispensing opticians (R. 235).

> Judge Vaught: What do you understand by "qualified person"?
>
> Mr. Hansen: I think any person who purports and claims to be qualified. I think all the opticians would say they are qualified. I think other persons who may not hold themselves out to be opticians, I think you could go into a jewelry and anybody that would want to take on the duty of repairing those glasses, even though he wasn't an optician, I think he could do that. I think I could do it, even though I would charge compensation for it, because as long as the statute doesn't go ahead and prescribe what the qualifications are, of this repair are, I think we could assume that it would be— (R. 186).

In other words, a lawyer, a plumber, a housewife, an optician—may lawfully be an "optical supplier." No one of these, however, may "represent or hold himself out to the public as being qualified to do any of the acts listed in this Section," according to the express language of Section 2.

2. Responsibility.

With the prescription thus demanded as a customer's ticket of admission to the place of business of every "optical supplier," except an optometrist, the statute proceeds ostensibly to regulate such suppliers by establishing "responsibility" for the work they perform. The responsibility, however, is placed *not* on the supplier optician but on the eye examiner whose prescription "such other person" fills. Factual analysis of the medical and optometric context within which this responsibility operates is essential to an understanding of its significance.

This provision has no practical application on optometrists. They do not refer their patients to opticians. As an integrated examiner-merchant, the optometrist sells both his services and the merchandise such services lead to. He is liable to be sure, as are all men, to the extent imposed by the common law for personal acts or omissions. But since he rarely issues a prescription, the optometrist

as a matter of fact will never be shouldered with the statutory responsibility for the deeds of others.

The effect on physicians is quite the contrary. Ophthalmologists and oculists write prescriptions but rarely fill them or provide the glasses. These medical men specializing in the realm of the eye render strictly professional service. The dispensing of optical goods, and the services related to their application to the wearer's face, are performed for patients of ophthalmologists by the optician. Thus, unlike that of the optometrist, completion of the process commenced by the ophthalmologist's refraction is wholly dependent on the skilled performance of others. And the practical operation of the statutory provision for responsibility is to make the ophthalmologist who releases a prescription an insurer of the quality of its dispensing by others in both the original and replacement fields.

Despite the fact that he is responsible, however, the ophthalmologist cannot dictate or compel his patient to patronize any particular optical dispenser. As stated by counsel for the State at trial,

> It must not be directed to any specific optician. It may be given to the patient. He can take it to the optician of his choice . . . with the responsibility, however, for the full effect of any appliances furnished remaining with the doctor (R. 83).

The complete lack of control of the ophthalmologist over the optician who fills his prescription is effectively illustrated by the fact that the Act sanctions transfer of a prescription from one optician to another, without approval of the author (Br. for Appellants, pp. 31-32).

Moreover, the ophthalmologist cannot compel the totally unregulated "optical supplier" whom his patient may patronize to fill the prescription in the designated fashion. Nor can he compel, though he may surely so suggest, the patient to return with his new, duplicate, or otherwise repaired eyeglasses for a check up. In other words, the provision makes the ophthalmologist legally liable for the acts

of unknown other persons, who are neither defined nor regulated by the State, nor are subject to any effective control or regulation by the ophthalmologist himself.

The only conceivable manner in which ophthalmologists could exercise a degree of control commensurate with their responsibility under Section 2 lies in construing that provision as authority to dictate, and by some arbitrary means eliminate, their patients' choice of optical supplier, and to compel them to return for a check up. Perhaps this could be achieved if the ophthalmologist, instead of handing the prescription to his patient, sent it direct to a selected supplier with orders to prepare the glasses, fit them to the patient, but thereafter return them, together with the prescription, for checking prior to release to the patient. Such intolerable interference with the public's free choice in the market for optical goods, however, was expressly renounced by the Attorney General of Oklahoma in the court below (R. 82-83).

The prescription-responsibility method of regulation established by Section 2 is without parallel.[11]

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[11] The unique character of the prescription-responsibility scheme of Section 2 is spotlighted by its comparison with the assertedly "similar legislation" of the states listed by the amicus American Optical Association, Inc. (Brief, pp. 28-29). A brief analysis of these 17 "duplication" states and 12 "definition" states discloses that, eliminating overlapping, they embrace a total of but 22 states of which none has either (1) a responsibility provision or (2) a prescription provision in any way comparable in scope with that of Section 2.

Instead, these 22 states are composed of (1) 5 which expressly license opticians to perform their traditional functions, i.e. California, Florida, Nevada, North Carolina and Virginia; (2) 7 others which specifically exempt from their optometry laws opticians or persons who sell eyeglasses or lenses but who do not attempt to adapt them "to the eye" (illegal practice of optometry), i.e. Idaho (§ 54-1515), Montana (§ 66-1316), New Mexico (§ 51-714), Ohio (Page's Rev. Code 1954, § 4725.14), Utah (§ 58-16-13), Washington (Rev. Code 1951, § 1853.040), and Wyoming (§ 37-1802); (3) 3 others which specifically exempt opticians or persons who only do mechanical work on lenses, frames or the fitting thereof, i.e. Tennessee (§ 7028), West Virginia (Code of 1949, § 2931(d), *State* v. *McGrail*, 117 W.Va. 51, 183 S.E. 686), and Maine

C. Constitutional Infirmities.

1. A Statute Aimed at Preventing Unqualified Persons From Dispensing Prescription Eyeglasses Which, Instead of Imposing Standards of Personal Qualification, Establishes Oppressive Conditions—Unrelated to the Public Welfare—On the Rights of Ophthalmologists and Opticians to Practice, Denies Due Process.

This Court, in an unanimous opinion delivered by Mr. Justice Brandeis, sustained in *Douglas* v. *Noble*, 261 U. S. 165, a statute regulating the practice of dentistry. It did so despite the strenuous contentions of unlicensed persons that the statute purported to confer upon a board of examiners arbitrary power to grant or withhold licenses. The basis of the Court's ruling was that, reasonably construed, the statute did not authorize the board to be arbitrary and appropriate review of the board's conduct was available. Such decision was well in accord with the time-honored doctrine that the judiciary must "decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act." Simul-

(§ 6(IV)); see also Montana (§ 66-1302(9)); (4) 6 others whose definition of optometry, by statute or judicial construction, contains nothing about fitting or adjusting lenses or frames to the face, i.e. Arkansas (§ 72-801, see *Ark. St. Bd. of Optom.* v. *Keller*, 218 Ark. 820, 239 S.W. 2d 14), Colorado (Rev. Stat. 1953, § 102-1-1), Iowa (§ 154.9), Louisiana (§ 1041(3), see *State* v. *Rones*, 223 La. 839, 67 So. 2d 98), Oregon (Rev. Stats. 1953 § 683.010) and South Dakota (§ 27.0701), and (5) one other state whose definition of optometry to embrace examining *and* fitting has been construed to exclude opticians, whose only function is fitting, i.e. Indiana (§ 63-1004, see *State ex rel Booth* v. *Beck Jewelry Ent. Inc.*, 220 Ind. 276, 41 N.E. 2d 622); see also Maine (§6(III)). The Iowa statute cited above contains no requirement of a prescription as prerequisite to duplicating and, moreover, requires that the optometrist give each patient his prescription. In addition, no state has, in the face of direct challenge by opticians, sustained a statute requiring prescriptions for duplicate lenses. The Supreme Court of North Carolina held such requirement unconstitutional in *Palmer* v. *Smith*, 229 N.C. 612, 51 S.E. 2d 8.

taneously, however, this Court reiterated the test, applicable to the statute at bar, that:

> If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practise dentistry, the statute would, of course, violate the due process clause of the 14th Amendment. 261 U. S. at 168.

Under the decision in *Douglas* v. *Noble* and the subsequent consistent rulings of this Court, the State of Oklahoma was afforded a wide range within which it might legislate to promote the interest of the public in visual care, subject only to the prohibition against unrelated conditions. Counsel for the State recognized the range, though not its limitation, in the court below. As he stated:

> the Legislature could have done one of two things, in my opinion. They could have either passed a licensing bill where these opticians would be examined and licensed and regulated by a board, in which case they might not need this provision where they must operate under the care and supervision of a professional man; or the Legislature could have done as it did and put these nonprofessional people, dealing with public vision, put them under the supervision of the professional man who makes the examination and who is responsible for his patient's eyesight. That is all this law does (R. 80).[12]

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[12] Although the pressures on a legislature are irrelevant "in testing constitutionality," *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, 224, they way occasionally shed light when the reasons for the legislative method, rather than subject, are obscure:

> Two things we do not want. First, we do not want to have our present law amended. Second, we do not want the dispensing opticians licensed to practice. (Letter from representative of Oklahoma Optometric Association, Plaintiff's Exhibit 2, R. 459-460).

It was in light of this atmosphere that the statement in the text was immediately followed by this interesting colloquy with the court:

> Judge Vaught: You conclude then because the optician is

But under the alternative adopted by Oklahoma, as forthrightly confessed to this Court by its Attorney General (Br. p. 13), no Oklahoma optician, as prerequisite to engaging in his trade or occupation, need

> possess prescribed educational qualifications or be of good moral character, or to pass a required examination and procure a license as a qualified optician.

Rather,

> *any person in this State, whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character, may operate as an optician in this State* (emphasis added).

The impact of the Attorney General's statement is clear. The statute, designed to assure the people of Oklahoma that "no unqualified person" shall correct their eyes—following refraction by a licensed practitioner—by improperly dispensing lenses and frames, leaves the dispensing of lenses and frames in the hands of "any person who purports and claims to be qualified" (R. 186), so long as he has physical possession of a prescription. This, then, is not a case where "a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing." *Barsky* v. *Board of Regents of University*, 347 U. S. 442, 451; *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608. It does not reach licensing. It does not establish or maintain in any way any standards whatever. The means employed by this

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not licensed the same as the optometrist, that he should not be permitted to exercise this particular function?

Mr. Daugherty: I don't say that, sir. I say the Legislature had two things it could have done with the same result, and it has gone this way, which we feel gets the job done, the main purpose being to see that the people get professional care for their eyes.

Judge Vaught: Well, sometimes that's the object of a law, and sometimes it's to assist another class.

Mr. Daugherty: Yes, sir (R. 80-81).

unique system to eliminate the unqualified optician have, by concession, nothing whatever to do with personal qualifications to practice.

Instead, under the means adopted by Oklahoma, the burden of responsibility for what the State failed to do is simply shifted to the shoulders of the ophthalmologist. But the shift is one of naked responsibility alone. The "responsible" ophthalmologist has no right under the statute to select the optician. His patient "must not be directed to any specific optician. . . . He can take it to the optician of his choice" (R. 82-83). And the patient cannot be compelled to return for a check up. Enforcement of the standards each individual ophthalmologist may deem essential to competent dispensing is utterly impossible. "Responsible," therefore, means only that the ophthalmologist can be sued if the dispenser does a poor job; it cannot affect the quality of dispensing, or the qualifications of the dispenser, or the right of incompetents to remain in business, at all. The statutory purpose to further the public welfare is not advanced one whit.

The Oklahoma statute does, however, in the face of the prohibition by this Court in *Douglas* v. *Noble*, *supra*, "impose conditions which have no relation to the applicant's qualifications to practise." It does so with respect both to ophthalmologists and opticians. It conditions the ophthalmologist's practice upon the automatic assumption of an oppressive and arbitrary responsibility for the full effect of any appliances furnished upon his prescription by unlicensed persons totally beyond his control. Any optical supplier anywhere may render the ophthalmologist an insurer of the quality of his dispensing by obtaining physical possession of the prescription. As to the optician, his practice is now totally conditioned upon the issuance of a prescription-license which, by the operation of the statute, may not issue at all: (1) The optometrists, with control of 60% of the public in the market for original eyeglasses, will not issue prescriptions which will merely enable their customers, for subsequent needs, to patronize

a competitor; and the statute does not require such issuance by optometrists;[13] (2) the ophthalmologists, by virtue of the burden mentioned above, will inevitably release fewer prescriptions; and (3) even if prescription-licenses do issue, the chances that they will reach the optician are further diminished by the prohibition that he—unlike the optometrist—may not hold himself out as being qualified to fill them. In sum, the optician's right to continue to practice is subjected to oppressive conditions unrelated to the public welfare.

Such conditions[14] which serve "not to regulate the business, but to preclude persons from engaging in it," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 279, are the very form of unreasonable and arbitrary interference the Fourteenth Amendment was designed to condemn. "The inevitable practical result of enforcing the act under consideration would be destruction of . . . a kind of undertaking not inherently harmful, but long regarded as useful and meritorious." *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510, 534. The only achievement of the means adopted will be to foment optometric monopoly at the expense of the two specialist groups in the field of visual care. The optometrist already refracts and dispenses for 60 percent of the eyeglass-wearing public. Since he will not voluntarily issue prescriptions and the statute does not compel him to do so, he will by virtue of statutorily conferred leverage gain a stranglehold on all the replacement needs of this group. The opportunity of the optician to

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[13] Compare, for example, the Iowa statute regulating optometrists: "Each such practitioner shall furnish his patient without charge a copy of his patient's prescription." Iowa Code Ann., Sec. 154.9.

[14] It is significant to note that the "State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral," are, in this case, even more remote than the hypothetical examples of license revocation on grounds of redheadedness or divorce posed by Mr. Justice Frankfurter, dissenting in *Barsky* v. *Board of Regents of University*, 347 U.S. 442, 470.

seek their patronage is now foreclosed: they have become a captive group of the optometrists. In the remainder of the market, the optometrist gains an immediate competitive advantage since Section 2 permits only him to hold himself out as qualified to perform the services of an optician. And as patients of the ophthalmologist and optician become patients of the optometrist, the number of refractions performed by the ophthalmologist will continually decrease with more and more patients becoming part of the optometrist's captive group. Thus the seemingly innocent "prescription" and "professional responsibility" create a system which in practical operation will continually expand the position of the optometrist in both examinations and dispensing until monopoly is achieved.

But as stated by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304, in an opinion urging the validity of a state statute: "To grant any monopoly to any person as a favor is forbidden." As otherwise stated in *Smith* v. *Texas*, 233 U.S. 630, 638:

> None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

In a strained attempt to justify this optometric monopoly, the Attorney General relies on data rarely contained in a prescription and an unenforceable professional responsibility to establish integrity, guarantee qualifications and confer competence and skill in the dispensing of eyeglasses. Apparently recognizing that any benefit from this system was at best remote and speculative, and being unwilling to hang its argument on such gossamer thread, the amicus American Optical Association, Inc., devises a new statutory purpose—more eye examinations—and cites

Roschen v. *Ward*, 279 U.S. 337, to dispose of the case. But the mere mention of some other worthwhile or desirable goal cannot rewrite or save a statute which never had it in mind or could bring it about. The fact is that Oklahoma neither attempted in its statute nor pretends in its brief that eye examinations are the objective. To the contrary the Attorney General has stated that the Act is *not* to be construed as requiring

> that one with corrective eyeglasses who desires a new frame or a duplicated lens must first return to the ophthalmologist or optometrist who previously examined him. This is not so by any language of the Act or by contemplated practice. He may return to his optician who has his prescription on file. He may have his prescription in his personal possession and can deliver the same to any optician of his choice. He may call on an optician who does not have his prescription and the optician may obtain the prescription either from an optician having the same or the examiner who prescribed it (Br. 31-32).

But even if some additional eye examinations might result, remote and speculative effects, intended or incidental, will not support legislation having the oppressive impact of this unique scheme.

2. A Statute Which, Totally Without Standards, Delegates Complete Control of One Occupational Group to Private Persons, Including Many Competitors, Denies Due Process.

Under the language of Section 2 as interpreted by the Attorney General, an ophthalmologist cannot discharge the responsibility imposed upon him by its provisions: he cannot exercise the supervision required to insure that the prescription he has issued has been properly dispensed. But even if the statute were construed to permit the ophthalmologist to select the dispenser of his prescription and upon this power of selection he could erect an effective system of supervision which would not be offensive to his

patients, the statutory scheme would still run afoul of the due process clause as an invalid delegation of unfettered power, without standards, to private persons.

Such delegation operates as follows. Absolute and sole power to issue prescription-licenses to customers is vested in ophthalmologists and optometrists. They may grant or withhold at will. If they grant, in light of their statutory responsibility, they must designate the opticians whom their patients must patronize. Every optician's livelihood is thus contingent upon the licensors' grace.[15] A private system of regulation by referral, with ironclad prohibitions against members of the public patronizing opticians of their own free choice, takes over.

The optometrist's license will not issue: he will not, and is not by the statute so compelled, send a prescription to a competitor when he can and does sell the lenses and frames himself. The ophthalmologist's license, to be sure, will be issued upon his impartial judgment as to which optician is best. In both cases, however, the judgment and standards are private and subjective: there is no administrative board, as in *Barsky* and *Semler*, *supra*, nor any opportunity for judicial review, as described in *Douglas* v. *Noble*, *supra*. The optician to whom no prescription is directed has no forum for appeal or relief.

Such delegation of power to one group to control another has long been condemned:

> [I]t is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . [I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to convey such power undertakes an intolerable and unconstitutional interference

[15] This problem is not present in the case of the pharmacist since the physician is not responsible for the manner in which his prescription is filled. Hence patient selection and not physician designation determines the choice of pharmacist.

> with ... rsonal liberty and private property. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311.

Similar delegations were invalidated by this Court, unanimously, in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, and *Eubank* v. *Richmond*, 226 U.S. 137. Each involved a delegation to private persons, unfettered by statutory standards, to deny to others the right to make lawful use of their own property. Yet, in the case at bar, in a manner similar to those just cited, "the exclusion" of opticians from the dispensing market "is not indispensable" to the statute's goal. "There is no legislative determination that" the operation of qualified opticians "would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary." Yet the failure of private persons "to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily . . . The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment." *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, *supra*, at 121-122.

The power delegated by Section 2 to licensed practitioners not only individually to establish private and subjective standards for opticians but also to determine which opticians meeting those standards or, indeed, conditions, may remain in business should not be sanctioned by this Court.

CONCLUSION

For generations, the ophthalmologist and the optician have rendered complementary services in the public interest. The specialist in all matters concerning the eye has utilized the specialist in optical dispensing to assure that the public may have the best possible visual care. It is the firm conviction of these Amici that the State of Oklahoma may not constitutionally enact legislation, unrelated to the public welfare, imposing oppressive restrictions on

their respective practices with the inevitable tendency to legislate a vital specialist team out of existence solely for the benefit of an integrated practitioner. For the foregoing reasons these Amici urge that the judgment of unconstitutionality of the court below be affirmed.

Respectfully submitted,

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APPENDIX

The relevant provisions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Ann., Title 59, §§ 941-942) are as follows:

> Section 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive th best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.
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> Section 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames, or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.